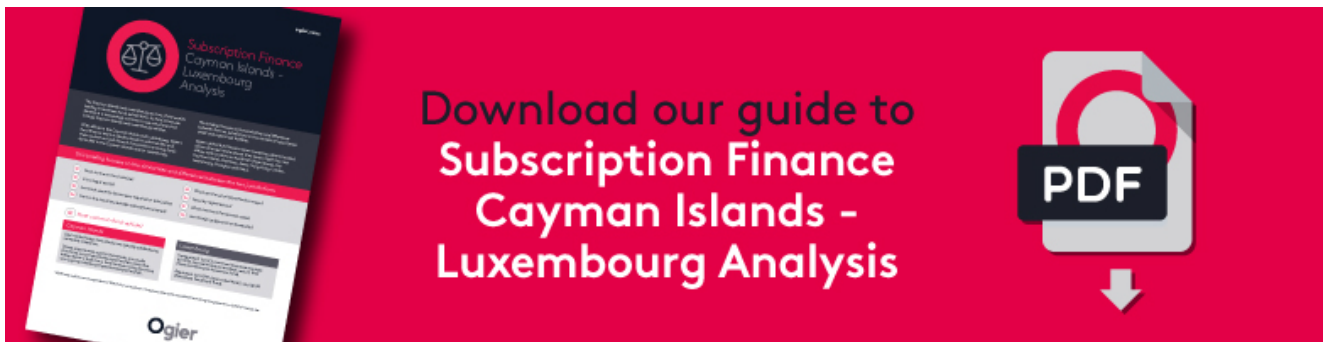


Subscription Finance Cayman Islands - Luxembourg Analysis

Publication - 01/03/2022



You can read [the infographic version of our jurisdiction analysis guide here](#).

The Cayman Islands and Luxembourg are two of the world's leading investment funds jurisdictions. As fund structures develop it is increasingly common to see structures that include Cayman Islands and Luxembourg vehicles.

With offices in the Cayman Islands and Luxembourg, Ogier's fund finance team is ideally placed to assist lenders and their counsel on fund finance transactions involving funds domiciled in the Cayman Islands and/or Luxembourg. Our specialist CAYLUX team provides combined Cayman and Luxembourg legal advice for all types of fund finance transactions.

This briefing focuses on the similarities and differences between the two jurisdictions in the context of subscription credit and capital call facilities. Ogier's global fund finance team comprises experts located across all major international time zones.

This briefing focuses on the similarities and differences between the two jurisdictions.

Q1 - Most common fund vehicle?

A - Cayman Islands

Open ended hedge fund vehicles are typically established as exempted companies. Closed ended private equity fund vehicles are usually structured as exempted limited partnerships (and what follows below is based on a fund borrower being structured as a Cayman Islands exempted limited partnership).

A - Luxembourg

Unregulated: (a) SCS (common limited partnership); (b) SCSp (special limited partnership); and (c) RAIF (Reserved Alternative Investment Fund). Regulated: (a) UCITS (open ended fund); and (b) SIF (Specialised Investment Fund). (Note - UCITS may only borrow the equivalent of 10% of their net assets on a temporary basis and are prohibited from acting as a guarantor on behalf of third parties)

Q2 - Is it a legal entity?

A - Cayman Islands

A Cayman Islands exempted limited partnership is not a legal entity – it acts through its general partner (GP). The GP would typically be a Cayman Islands company or limited liability company (LLC), a Cayman Islands exempted limited partnership (which itself would have its own GP) or a foreign entity.

A - Luxembourg

Yes, other than the SCSp (special limited partnership), which has no separate legal personality. Both the SCS and the SCSp act through their general partner (GP).

Q3 - Are local security documents required or advisable?

A - Cayman Islands

It is not necessary to have a local security agreement to document the security over the uncalled capital commitments and the rights to call capital. Nor is it necessary to have a local security agreement to document security over the bank account into which capital commitments are deposited – the bank account would not usually be located in the Cayman Islands so the bank account security would be governed by the laws governing the account (typically US or English law).

A - Luxembourg

It is recommended and it is market practice to have local security documents over the assets located or deemed to be located in Luxembourg (such as claims governed by Luxembourg law or owed by a debtor located in Luxembourg, or accounts opened with banks located in Luxembourg). Luxembourg law will apply in relation to the creation, perfection and enforcement of security interests over assets located in Luxembourg.

Q4 - How is the security package typically structured?

A - Cayman Islands

Security over uncalled capital commitments and rights to call capital are typically expressed as an assignment by way of security and it is usual for both the fund (acting through its GP) and the GP to be party to the security agreement (the Exempted Limited Partnership Law (Revised) provides that the right to make capital calls and receive the proceeds of them are assets of the exempted limited partnership and are held on trust for the exempted limited partnership by the GP). Where rights to call capital have been formally delegated to the fund's investment manager (either within the terms of the fund's limited partnership agreement or pursuant to an investment management agreement) consideration should be given as to whether the investment manager ought to also grant security over any rights it may have to call capital on behalf of the fund. Security over a Cayman Islands bank account would typically be expressed as a bank account charge and would be entered into by the fund acting through its GP.

A - Luxembourg

Security over uncalled capital commitments and rights to call capital are typically expressed as a pledge agreement or security assignment. It is usual for both the fund and the GP to be party to the security agreement. When the fund qualifies as an alternative investment fund, it is required to appoint an authorized alternative investment fund manager (AIFM) and a depository. Depending on the terms of the fund documents, the AIFM may also have to become a party to the security documents. Security over an account into which the investors deposit their capital commitments would typically be expressed as a bank account pledge. Sometimes depository agreements grant a right of information/right of consent to the depository in connection with the creation of security over the deposit accounts held at the depository. The creation of such security is governed by the law of 5 August 2005 on financial collateral arrangements, as amended. As such, it is not subject to any particular formalities other than that the attachment of the secured collateral is capable of being evidenced in writing.

Q5 - What are the priority/perfection steps?

A - Cayman Islands

Priority of the security over the uncalled capital commitments is achieved by giving notice of the creation of the security interest to the investors. Aside from establishing priority, giving notice to the investors has additional benefits for lenders: (a) until investors receive notice they are entitled to treat the fund/GP as the person to whom they are liable and to obtain a good discharge by payment to, or settlement with, the fund/GP. Old English case law (highly persuasive but not technically binding in Cayman) suggests that once an investor receives notice of the security assignment the investor is barred from thereafter accepting a release by the fund/GP of its obligations or a variation of its obligations in a manner prejudicial to the secured party; and (b) after investors have been notified of the security interest the investors will not be able to set-off against their uncalled capital commitments any amounts which become due and payable to the investors (from the fund) after they have received the notice. Priority of the security over the bank account into which capital commitments are deposited (if the account is located in the Cayman Islands) is achieved by giving notice of the creation of the security interest to the account bank.

A - Luxembourg

No notification is required in order to validly create and perfect the security over the uncalled capital commitments. Such security is perfected by the mere conclusion of the security assignment/pledge agreement between the fund, the general partner and the lender and the inclusion of the list of investors and the amount of their respective amount of uncalled capital commitment as a schedule to the agreement. However, an investor may nevertheless validly discharge

its obligation under the subscription agreement as long as it has no notice of the assignment/pledge. Notification of the security is therefore recommended even if not required for perfection purposes. In relation to the perfection of the bank account security, the account bank must be notified of the pledge and asked to relinquish any rights of set off, combination of accounts or first ranking pledge in the respect of the account collateral which would otherwise apply in standard account bank terms and conditions.

Q6 - Security Registrations?

A - Cayman Islands

There is no central security registration regime in the Cayman Islands for security over uncalled capital commitments and rights to call capital. Cayman companies (including LLCs) are required under section 54 of the Companies Law to maintain a register of mortgages and charges into which details of all security interests granted by a Cayman company need to be entered. The register of mortgages and charges is an internal register only and failure to make an entry does not affect priority or validity of the security. Where a Cayman company is the GP or ultimate GP of a fund that has granted security, it is common for the GP or ultimate GP to make an entry in its register of mortgages and charges in respect of security interests granted by it in its capacity as GP or ultimate GP (as the case may be), but there is no strict requirement to do this.

A - Luxembourg

There is no central security registration regime in Luxembourg.

Q7 - What are the enforcement steps?

A - Cayman Islands

A secured party would enforce using its contractual rights under the relevant security documentation. Where the security documentation is Cayman Islands law governed, an enforcement scenario would likely involve the secured party appointing a third party receiver over the collateral. The receiver would take action to recover the outstanding secured obligations for the secured party which would result in the receiver making capital calls on the investors.

A - Luxembourg

With respect to Luxembourg law governed security agreements, the secured party will likely step into the shoes of the GP and make capital calls either in the secured party's name or the name of the GP pursuant to the terms of the security documentation. The secured party would typically have the power to direct where the investors pay their capital calls at that point, but may rely on a co-related account pledge to trap the capital call proceeds instead.

Q8 - Are foreign judgments enforceable?

A - Cayman Islands

Although there is no statutory enforcement in the Cayman Islands of judgments or orders obtained in foreign courts (other than certain courts of Australia and its external territories), the courts of the Cayman Islands will generally recognise and enforce a foreign judgment or order, without re-examination or re-litigation of the matters adjudicated upon provided the judgment: (a) is given by a foreign court of competent jurisdiction; (b) is final and conclusive; (c) is not in respect of a tax, fine or other penalty; (d) was not obtained by fraud; and (e) is not of a kind the enforcement of which is contrary to public policy in the Cayman Islands.

A - Luxembourg

A judgment obtained from any court of competent jurisdiction in the State of New York which is enforceable in the United States of America may be recognised and enforced before the Luxembourg courts, without reexamination of the merits or re-litigation of the matters, the subject of such proceedings, subject to compliance with the following conditions: (a) the foreign court order must be enforceable in its own, domestic jurisdiction; (b) the foreign court must have been validly seized of jurisdiction according to both its own laws and applying Luxembourg conflict of laws rules; (c) the foreign court's procedure must have been correctly applied in the case in question; (d) the foreign court's procedure must have respected the rights of respondent to the action; (e) the foreign court must have applied the system of laws that would have been applied under Luxembourg conflict of laws rules, or, at least, the order must not contravene the principles underlying these rules (principe d'équivalence); (f) the requirements of the foreign court order together with the underlying judgment must not contravene Luxembourg mandatory international judicial public policy, and (g) the foreign order must not have arisen as a consequence of an attempt to evade the requirements of Luxembourg law (fraude à la loi). A judgment obtained from any court of competent jurisdiction in England will be enforceable pursuant to and subject to the requirements of the EU Council Regulation N° 1215/2012.

About Ogier

Ogier provides practical advice on BVI, Cayman Islands, Guernsey, Irish, Jersey and Luxembourg law through its global network of offices. Ours is the only firm to advise on these six laws. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

Key Contacts



James Heinicke
Partner
Cayman Islands
James.Heinicke@ogier.com
T+1 345 815 1768
M+1 345 516 0453



Daniel Richards
Partner
Luxembourg Legal
daniel.richards@ogier.com
T+352 2712 2011
M+352 691 772 018



Mark Santangeli
Partner
Cayman Islands
mark.santangeli@ogier.com
T+1 345 815 1766
M+1 345 516 5934



Jad Nader
Partner
Luxembourg Legal
jad.nader@ogier.com
T+352 2712 2047
M+352 691 252 047



Nicolas Mille
Counsel
Luxembourg Legal
nicolas.mille@ogier.com
T+352 2712 2012
M+352 621 263 187



James Lydeard
Group Partner, Ogier Legal L.P.
Jersey
james.lydeard@ogier.com
T+44 1534 514270



Tommy Tuohy
Managing Associate
Cayman Islands
tommy.tuohy@ogier.com
T+1 345 815 1749
M+1 345 325 2626

Related services

Banking and Finance
Fund Finance
CAYLUX fund finance